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No.

IN THE

Supreme Court of the United States

OCTOBER TERM 1982

RUSSELL BUFALINO,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Questions Presented

1. Whether the provision of the Speedy Trial Act which requires the trial court to promptly dispose of pretrial motions was violated when the trial court delayed approximately seven months in deciding an unopposed Government Motion to Sequester the Jury?

2. Whether a defendant can be deemed to have waived his rights under the Speedy Trial Act by not responding to a Government Motion to Sequester the Jury which he did not oppose?

3. Whether an admittedly erroneous instruction to the jury which prohibited their consideration of crucial impeachment evidence against the Government's two main witnesses by eliminating from the jury's consideration plea bargain benefits, immunity and payments made to those witnesses, can be rendered harmless by the summation of counsel?

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

RUSSELL BUFALINO,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Petitioner, Russell Bufalino, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on June 15, 1982.

Citation to Opinion Below

The opinion of the United States Court of Appeals for the Second Circuit in this case is cited as *United States* v. *Bufalino*, Docket No. 81-1474, 683 F.2d 639 (2d Cir. 1982), and the opinion appears in the Appendix hereto.

Jurisdiction

The judgment of the Court of Appeals for the Second Circuit was entered on June 15, 1982. A timely Petition for Rehearing and Suggestion for Rehearing En Banc were denied on August 4, 1982, and this Petition for Certiorari was filed within sixty (60) days of that date, in accordance with Rule 20.1 of the Rules of the Supreme Court of the United States. This Court's jurisdiction is invoked under 28 U.S.C. Section 1254(1).

Statutes Involved

As provided by Supreme Court Rule 21.1.(f), the verbatim quotations of the pertinent portions of 18 U.S.C. Section 3161; Rule 3 of the Local Rules for the Southern District of New York; and Second Circuit: Guidelines under the Speedy Trial Act are set forth in the Appendix hereto.

Statement of the Case

On December 30, 1980, a Federal Grand Jury sitting in the Southern District of New York returned a one count indictment charging Russell Bufalino with Conspiracy to Obstruct Justice in violation of 18 U.S.C. Section 371. This indictment was superseded on April 2, 1981 by an indictment charging one count of Conspiracy against the Rights of Citizens in violation of 18 U.S.C. Section 241 and Obstruction of Justice in Violation of 18 U.S.C. Section 1503.[1]

Bufalino was arraigned on January 9, 1981. On March 9, 1981, he filed his first set of pretrial motions and the Government responded to those motions on March 24, 1981. On March 27, 1981, the Government filed a pretrial Motion to Sequester the Jury. The Defendant did not oppose this motion and therefore filed no response.

On April 30, 1981, after the filing of the superseding indictment, Bufalino filed his second set of pretrial motions. The Government responded to those motions on May 26, 1981.

Since no hearings were granted on any pretrial motions, all contested motions were under advisement by May 26, 1981 and under the provisions of the Speedy Trial Act, the 30 day ex-

[1]The original indictment was not dismissed until the conclusion of trial.

cludable period for motions under advisement ended on June 25, 1981. On July 28, 1981, the trial court disposed of all pretrial motions except for the Government's uncontested Motion to Sequester the Jury.

On September 30, 1981, Bufalino filed a motion to dismiss the indictment under the provisions of the Speedy Trial Act, which motion was denied on that same date by the trial court.

The trial court finally granted the Government's unopposed Motion to Sequester the Jury on October 19, 1981, approximately seven (7) months after the motion was filed. Trial commenced on October 19, 1981, 283 days after the date Bufalino was arraigned, and 116 days after the excludable period for contested pretrial motions had ended.

At trial, the Government's evidence against Bufalino consisted primarily of the testimony of two accomplice witnesses, James Fratianno and Stephen Fox. The Defendant testified on his own behalf, and the primary determination to be made by the jury involved weighing the credibility of the Government's accomplice witnesses against that of the Defendant Bufalino.

Both of the Government's accomplice witnesses received substantial benefits in exchange for their cooperation. Fratianno was on the Witness Protection Program and had received benefits totaling approximately $200,000.00, $50,000.00 of which was paid shortly before this trial. Fratianno had been charged with a number of crimes including a number of murders. As a result of his cooperation with the Government, Fratianno was released from prison after serving approximately 21½ months. The other accomplice witness, Stephen Fox, was also offered an opportunity to participate in the Witness Protection Program and he hoped to obtain an early parole as a result of his cooperation.

Bufalino's case to a large extent rested on his attack on the credibility of the Government's accomplice witnesses. The focus

of that attack was that Fratianno and Fox testified favorably for the Government because of the enormous benefits they received for their cooperation.

Bufalino requested the Court to charge the jury that the testimony of Fratianno and Fox should be scrutinized with care and caution and that the jury should consider whether their testimony was affected by the benefits they received from the Government in the form of plea agreements, immunity and witness payments.

The trial court did not give the charge as requested but rather specifically instructed the jury that in determining the credibility of these witnesses the jury could only consider the witness's interest in the outcome of the case and not his interest in testifying. Specifically, the trial court instructed the jury as follows:

> "If you find, however, that an informer believes that he has a real interest in the *outcome* of this case, then you consider that, also, in determining his credibility.
>
> For example, if a person here, informer, believes that his term of imprisonment may be shortened, not because of his testimony, but because of the outcome of the case, all right, then he has a real interest in the case."

Since the interest of Fox and Fratianno stemmed from the benefits they received in exchange for their testimony, and regardless of the ultimate outcome of the case, this instruction by the court had the effect of eliminating from the jury's consideration in determining the credibility of these witnesses, all of the benefits which Fox and Fratianno received in the form of reduced sentences, immunity and witness payments.

Bufalino took specific exception to the court's instruction to the jury. However, the trial court did nothing to correct the error and on October 22, 1981, the jury returned a verdict of guilty against Bufalino on both counts of the indictment.

Reasons for Granting Certiorari

I.

The Circuit Court's interpretation of the excludable period for pretrial motions under the Speedy Trial Act, which allowed the trial court to delay trial by sitting on an uncontested Government Motion to Sequester the Jury for a period of seven months, creates a loophole in the provisions of the Act which is contrary to the legislative intent and which undermines the policy of the Act.

This case contains an important issue of first impression concerning the interpretation of the excludable period for pretrial motions under the Speedy Trial Act. (18 U.S.C. Section 3161 et seq. hereinafter referred to as the "Act"). Specifically, the Court of Appeals by ignoring that provision of the Act requiring "prompt disposition" of pretrial motions has interpreted the Act so as to create a loophole which allowed the trial court to sit on a simple uncontested Government Motion to Sequester the Jury for almost seven months and delay the start of trial far beyond the period contemplated by the Speedy Trial Act.

The Government filed its Motion to Sequester the Jury on March 27, 1981.[2] Bufalino did not respond to the Motion since he did not oppose sequestration. Although the trial court disposed of all other pretrial motions on July 28, 1981, the sequestration motion was not disposed of until the first day of trial, October 19, 1981, some seven months after it was filed.

There are two provisions in the Act governing the excludable period for pretrial motions. 18 U.S.C. Section 3161 (h)(1)(F) (hereinafter referred to as "Subsection (F)") excludes that period from the filing of the motion to its "prompt disposition".

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[2]This was 18 days after the deadline established by the trial court for filing pretrial motions.

18 U.S.C. Section 3161 (h)(1)(J) (hereinafter referred to as "Subsection (J)"), further limits the excludable time by providing that once a motion comes under advisement a maximum of thirty days shall be excluded.

The Court of Appeals held that since no response was filed to the Government sequestration motion, that motion was never under advisement and the entire seven-month period from the filing of the motion until its ultimate disposition on the day of trial is excludable under the Act.

The decision of the Court of Appeals completely ignores Subsection (F) which limits the excludable period for pretrial motions to that time which is reasonably necessary to effect a "prompt disposition" of the motion. The ruling of the Court of Appeals renders meaningless the "prompt disposition" language of Subsection (F) and effectively relieves the trial court of the burden of promptly disposing of pretrial motions.

If the decision of the Court of Appeals is allowed to stand, the trial court will have unlimited discretion in determining a timetable for the disposition for pretrial motions and consequently unlimited discretion in the scheduling of criminal trials. Such a holding severely undermines the policy of the Speedy Trial Act.

The exact problem created by the decision of the Court of Appeals in this case was contemplated when the 1979 amendments to the Act were considered.

As originally enacted, the Act excluded only those court days actually consumed in the disposition of pretrial motions. Fearing the exclusion too restrictive, the legislature amended the Act in 1979 and allowed an exclusion from the filing of pretrial motions to hearing or other "prompt disposition".

The Senate Committee Report approving the amendment cautioned:

> "Nor does the Committee intend that additional time be made eligible for exclusion by postponing hearing date or other prompt disposition of the motion *beyond what is reasonably necessary*". S. Rep. No. 96-212, 96th Cong., 1st sess. 33-34 1979, reprinted in Fed. Judicial Center, Legislative History of Title 1 of the Speedy Trial Act 115 (1980). (Emphasis added.)

The Senate Committee Report went on to observe that this amendment "could become a loophole which could undermine the whole Act". The Committee suggested that each court adopt procedures setting a specific timetable for the filing of pretrial motions. S. Rep. No. 96-212, supra, p. 34.

Similarly, the House Committee Report recognizing possible abuse of this exclusion stated that the amendment was approved

> ". . . with the intention that potentially excessive and abusive use of the exclusion be precluded by district or circuit guidelines, rules or procedures relating to motions practice". H.R. Rep. No. 96-30, 96th Cong., 1st sess. (1979), reprinted in 1979 U.S. Code Cong. and Admin. News 805, 814.

Professor Robert L. Misner also recognized the possible loophole created by the 1979 amendments and stated:

> "By joining these two provisions, the Government or defense counsel may file motions that toll the time, or the judge may take virtually any amount of time in setting the motion for hearing or for taking the motion under advisement. The only limitation on the judge is that the hearing or disposition of the motion must be 'prompt'. The discretionary aspect of 'promptness' returns to the criminal process the type of discretion Congress originally intended to limit in the Act". Misner, the 1979 amendments to the Speedy Trial Act: Death of the Planning Process, 32 Hast. L.J. 635, 655 (1981).

As stated in both the Senate and House Committee Reports above-cited, possible abuse which could result from the uncertainty as to what constitutes "prompt disposition" of pretrial motions could be precluded by district or circuit guidelines regulating motions practice. The Second Circuit has adopted such guidelines establishing a pretrial motion timetable and requiring that any response to pretrial motions be filed within ten days. Second Circuit: Guidelines Under the Speedy Trial Act (January 16, 1979).

The Circuit Court held that since the decision of the trial court on the sequestration motion hinged on the defendant's position relative to that Motion, it was reasonable for the trial court to wait to hear from the defendant before finally disposing of the Motion. While that may be true, there was certainly no excuse for waiting seven months for the defendant's response. It is relatively standard practice for a trial court to presume that a party who does not respond to a motion, does not oppose that motion. Since the Second Circuit guidelines allow ten days for responding to pretrial motions, to hold that the trial court was justified in waiting seven months for the defendant's response is totally unreasonable and makes a mockery of the Act.

It was clearly the intention of the legislature to place a burden on the trial court to promptly dispose of pretrial motions so as not to delay the scheduling of a criminal trial. Administrative Office Speedy Trial Issuance No. 33 (August 1981) at p. 55. When the trial court in this case delayed seven months in disposing of the Government's uncontested Motion to Sequester the Jury, it can hardly be said that the court met its burden of promptly disposing of pretrial motions.

When the Government filed its sequestration motion and no response was received within ten days as prescribed by the Second Circuit Guidelines, the motion should have been considered "under advisement" for the purpose of triggering the maximum thirty-day excludable period under Subsection (J). Certainly,

this interpretation of what constitutes "prompt disposition" is more reasonable and more in keeping with the legislative intent than the interpretation suggested by the Court of Appeals when it determined that there was prompt disposition when the trial court delayed trial while it sat back and waited seven months for the defendant to file a response to the Government's Motion to Sequester the Jury.

The primary objective of the Speedy Trial Act is the "protection of the societal interest in speedy disposition of criminal cases by preventing undue delay in bringing such cases to trial". S. Rep. No. 212, supra, at 28-29.

To allow the decision of the Court of Appeals to stand is to allow a loophole in the Act which will give trial courts complete discretion in the scheduling of criminal trials. Such an interpretation is contrary to legislative intent and will greatly undermine the purpose of the Act which is to compel trial courts to promptly dispose of criminal cases.

II.

The decision of the Circuit Court that the defendant cannot claim relief under the provisions of the Speedy Trial Act because he did not respond to a Government motion which he did not oppose is tantamount to a holding that the defendant's lack of response to the uncontested motion constitutes a waiver of his rights under the Speedy Trial Act, despite clear legislative intent against such waiver.

The Court of Appeals held that the trial court's delay of seven months in deciding the Government's Motion to Sequester the Jury was somehow caused by the defendant's failure to respond to that motion. In effect, the Appeals Court ruled that Bufalino by not responding to a motion he did not oppose, waived his right to have that motion promptly disposed of and consequently

waived his right to a prompt trial. Although the Circuit Court explicitly denied that its ruling should be construed in terms of a waiver, no other interpretation is possible.

Since the Speedy Trial Act was enacted to protect the societal interest in the prompt disposition of criminal cases, it is contrary to the purpose of the Act to hold that mere inaction by a defendant with respect to a Government motion which he did not oppose, could constitute a waiver of the provisions of the Act and a waiver of society's interest in the prompt disposition of his trial.

The Senate Committee Report on the 1979 amendments to the Act stated:

> "The Committee wishes to state, in the strongest possible terms, that any construction which hold that any of the provisions of the Speedy Trial Act is waivable by the defendant, other than his statutorily-conferred right to move for dismissal as cited above, is contrary to legislative intent and subversive of its primary objective". S. Rep. No. 212, supra, at 28-29.

The Circuit Court's holding in this case that Bufalino by not responding to a motion he did not oppose, had no right to expect prompt disposition of that motion, is clearly subversive of the primary objective of the Speedy Trial Act.

In any event, since a defendant has no obligation to respond to a motion he does not oppose, and since it is clearly the obligation of the moving party, in this case the Government, to see that its motion is disposed of, it is submitted that there is no basis for the Circuit Court's ruling.

In fact, Rule 3 of the Local Rules of Procedure in criminal cases for the Southern District of New York specifically requires that a moving party, in this case the Government, determine

prior to filing any motion, whether there is opposition to that motion. If blame is to be placed on any party, then it should be placed on the Government for failure to comply with this Rule and for failure to prosecute its own motion.

As stated previously, it is standard practice that when a party does not file a response to a motion, he is presumed not to oppose that motion. Here when Bufalino did not respond to the sequestration motion within the ten days prescribed by the Second Circuit Guidelines, the trial court should have presumed that Bufalino did not oppose sequestration. Certainly, when months began to go by after the filing of the motion, the trial court had no reason to expect that Bufalino opposed the motion or intended to file a response.[3]

In conclusion, this Court should review the decision of the Second Circuit and in keeping with the primary objective of the Speedy Trial Act, make it clear that the societal interest in prompt disposition of criminal trials cannot tolerate a seven-month delay while the trial court waits for the defendant to respond to a Government motion which he does not oppose.

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[3]Administrative Office Speedy Trial Advisory Issuance No. 33 (August 1981) defines the end of the excludable period for pretrial motions under subsection (F) as that time when the Court received everything it expected to receive from the parties before rendering a decision. Also, it should be noted that the trial court never asked the defendant for his position on the sequestration motion until a pretrial conference held three weeks before the start of trial at which time the defendant advised the Court that he did not oppose sequestration.

III.

The decision of the Circuit Court that an admittedly erroneous jury instruction which prohibited the jury from considering crucial impeachment evidence against the Government's two accomplice witnesses can be rendered harmless by the summation of counsel is in direct conflict with a decision of the Fifth Circuit Court of Appeals on the same issue.

The evidence against Bufalino in this case consisted of the testimony of two Government witnesses, Fratianno and Fox. Substantial impeachment evidence was introduced at trial with respect to both of these witnesses. That evidence consisted of actual benefits received or promised in exchange for their testimony. With respect to Fratianno, the evidence showed that he was placed on a Witness Protection Program and received $200,000.00 in benefits, $50,000.00 of which was paid to him shortly before trial in this case. In addition, pursuant to a plea bargain, Fratianno entered guilty pleas to a number of crimes, including a number of murders and as a result of the intercession of the Government, served only 21½ months of incarceration. Fox also was offered an opportunity to participate in the Witness Protection Program and hoped to obtain an early parole as a result of his testimony.

Bufalino requested the Court to charge the jury that the testimony of Fratianno and Fox should be scrutinized with care and caution and that the jury should consider whether their testimony was affected by the benefits they received from the Government in the form of plea agreements, immunity and witness payments.

The Court did not give the charge as requested but rather instructed the jury that they could only consider those benefits received by the witness as a result of the outcome of the case, thus eliminating from the jury's consideration the bulk of the impeachment evidence.

Specifically, the trial court instructed the jury as follows:

> "If you find, however, that an informer believes that he has a real interest in the *outcome* of this case, then you consider that, also, in determining his credibility.
>
> For example, if a person here, informer, believes that his term of imprisonment may be shortened, *not because of his testimony but because of the outcome of the case,* all right, then he has a real interest in the case." (Emphasis added.)

The Second Circuit apparently agreed that this instruction was "equivocal" and "inadequate". However, the Court held that this erroneous instruction was rendered harmless by the defense summation attacking the credibility of these witnesses.

Although it is admitted that the failure to give an accomplice instruction is not reversible error in every case, it is submitted that when the Court's instruction to the jury serves not to call into question the credibility of an accomplice but rather bolsters that credibility by excluding from the jury's consideration crucial impeachment evidence, then, in such a case, the charge of the Court has deprived the defendant of a fair trial and should be deemed reversible error.

The holding of the Second Circuit, that the jury could disregard the trial court's erroneous instruction, in favor of defense counsel's summation, is sheer fantasy and in conflict with the principle established by the Fifth Circuit Court of Appeals in the case of *United States* v. *Bernard,* 625 F.2d 854 (5th Cir. 1980).

In *United States* v. *Bernard, supra,* the Defendant argued that the Court's failure to give an accomplice instruction was plain error. The Government responded that any such error was harmless on the theory that the summation arguments of the Defendant's counsel adequately admonished the jury to consider ac-

complice testimony with caution. The Fifth Circuit found this argument "unpersuasive" holding:

> "A jury's response to instructions from the judge is and should be quite different from its response to arguments from counsel. Counsel's argument is neither law nor evidence and the jury is so instructed". (At p. 857)

It is submitted that this Court should review the decision of the Second Circuit in this case to resolve the conflict between circuits as to whether an erroneous jury instruction concerning the credibility of Government witnesses can be cured by the summation of defense Counsel.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Second Circuit.

Respectfully submitted,

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Opinion of the Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 846—August Term, 1981

(Argued March 23, 1982 Decided June 15, 1982)

Docket No. 81-1474

UNITED STATES OF AMERICA,

Appellee,

—v.—

RUSSELL BUFALINO,

Defendant-Appellant.

Before:

FEINBERG, *Chief Judge,* OAKES, *Circuit Judge,* and FRIEDMAN, *Chief Judge,* United States Court of Claims.*

Appeal from judgment in the United States District Court for the Southern District of New York, Kevin T. Duffy, J., convicting Russell Bufalino of conspiracy to violate the civil rights of a United States citizen, in violation of 18 U.S.C. § 241, and endeavoring to obstruct justice, in violation of 18 U.S.C. § 1503. Appellant claims he was denied his statutory rights to a speedy trial evidence introduced against him and to certain jury instructions.

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* Sitting by designation.

Judgment affirmed.

NATHANIEL H. AKERMAN, Assistant United States Attorney for the Southern District of New York, (John S. Martin, Jr., United States Attorney for the Southern District of New York, Mark F. Pomerantz, Assistant United States Attorney, of Counsel (*for Appellee*).

CHARLES P. GELSO, Wilkes-Barre, PA. (*for Defendant-Appellant*).

FEINBERG, *Chief Judge*:

Russell Bufalino appeals from a judgment of conviction entered in November 1981 in the United States District Court for the Southern District of New York, Kevin T. Duffy, J., after a jury trial. Appellant's principal argument on appeal is that he was denied his statutory right to a speedy trial. We find that this and appellant's other claims are without merit, and we affirm.

Briefly, the events leading to this appeal are as follows. In April 1976, appellant attempted to recover a $25,000 debt from Jack Napoli by threatening to kill him. Unfortunately for appellant, prior to their meeting, Napoli had taken the precaution of concealing a tape recorder on his body, and used it to record Bufalino's conversation. On the basis of Napoli's testimony, Bufalino was indicted for extortion. Anticipating that the government would call Napoli as a witness at trial, appellant arranged with a business acquaintance, James Fratianno, for Napoli's elimination. This arrangement was unsuccessful, possibly because Napoli had joined the Justice Department's Witness Protection Program and had been relocated and given a new identity. In any case, Napoli lived to testify at the extortion trial and Bufalino was convicted of extortion in August 1977 and was sentenced to four years in prison, see United States v.

Bufalino, 576 F.2d 446 (2d Cir.), cert. denied, 439 U.S. 928 (1978). While in jail, appellant again sought to murder Napoli, this time with the aid of another prisoner, Steven Fox, who was about to be paroled. This attempt also failed, but in December 1980, Bufalino was indicted for conspiring to obstruct justice. On April 2, 1981, this indictment was superseded by a second indictment charging Bufalino[1] with conspiring to violate the civil rights of a United States citizen, in violation of 18 U.S.C. § 241 (Count One), and endeavoring to obstruct justice, in violation of 18 U.S.C. § 1503 (Count Two).

At trial, James Fratianno, who was by this time also a member of the Witness Protection Program, and Steven Fox, who was in jail on other charges but had been offered the benefits of that program after his release, testified for the prosecution. Bufalino's defense was a general denial. Testifying in his own behalf, appellant denied that he intended to have Napoli killed for his role in the extortion prosecution. He also called several witnesses to contradict elements in the prosecution's case. In rebuttal, the Government played the tape recording of the threat on Napoli's life.[2] The jury convicted Bufalino on both counts, and he was sentenced to 10 years imprisonment and fined $10,000 on Count One and to a concurrent term of five years imprisonment and fined $3,000 on Count Two. Appellant claims that his conviction must be reversed because he was denied his statutory right to a speedy trial, inadmissible testimony was introduced at trial, and certain jury instructions were in error.

---

[1] Michael Rizzitello was indicted with Bufalino and tried with him. The original indictment, charging both with conspiracy to obstruct justice, was superseded by the April 2 indictment which charged both appellant and Rizzitello with conspiring to violate Napoli's civil rights and Bufalino alone with endeavoring to obstruct justice. Rizzitello was acquitted.

[2] In the portion of the tape most damaging to Bufalino, he stated:

> [A]nd if you're going to do it, don't do the right thing, I'm going to kill you, [epithet omitted], and I'm going to do it myself, and I'm going to go to jail just for you. . . .

I. Speedy Trial

Bufalino's speedy trial claim is based on events that occurred between his arraignment on January 9, 1981[3] and the trial, which began on October 19, 1981. Under the Speedy Trial Act, 18 U.S.C. §§3161 et seq., a defendant is entitled to have the charges against him dismissed[4] if he is not brought to trial within 70 days of arraignment, unless the excess days fall within a list of exclusions set out in § 3162(h).[5] Since Russell Bufalino was tried 283 days after he was arraigned, the issue before us is whether 213 of those days are excludable.

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[3] Bufalino was arraigned through counsel on January 9, 1981, and did not personally appear until May 8. Although an argument could be made that his speedy trial rights were tolled prior to his personal appearance, at a hearing before Judge Brieant on January 8, all the parties agreed that the speedy trial "clock" would begin to run as of the date Bufalino was arraigned through his attorney.

[4] Section 3162(a)(2) provides:

> If a defendant is not brought to trial within the time limit required by section 3161(c) as extended by section 3161(h), the information or indictment shall be dismissed on motion of the defendant. The defendant shall have the burden of proof of supporting such motion but the Government shall have the burden of going forward with the evidence in connection with any exclusion of time under subparagraph 3162(h)(3). In determining whether to dismiss the case with or without prejudice, the court shall consider, among others, each of the following factors, the seriousness of the offense; the facts and circumstances of the case which led to the dismissal; and the impact of a representation on the administration of this chapter and on the administration of justice. Failure of the defendant to move for dismissal prior to trial or entry of a plea of guilty or nolo contendere shall constitute a waiver of the right to dismissal under this section.

Because we affirm this conviction, we do not consider whether the factors present in this case would have mandated a dismissal with prejudice.

[5] Section 3162(h) provides in relevant part that:

> (h) The following periods of delay shall be excluded in computing the time within which an information or an indictment must be filed,

(Footnote continued on following page)

The government has presented us with several ways to reckon the excludable periods that arose in this prosecution. Its most forcefully-urged alternative, which it presented at oral argument, involves excluding one day for Bufalino's co-defendant's bail hearing on January 13 under § 3161(h)(1)(J) [hereinafter "(J)"], two days for the weekend preceding the trial under Fed. R. Crim. P. 45(a); and 210 days for motion practice under § 3161(h)(1)(F) ["(F)"]. To arrive at this figure for motion practice, the government excludes the entire period from January 20, when defense counsel claims to have discussed a schedule for filing pretrial motions with Judge Duffy's law clerk, to July 28, when the court decided all the pending motions with the exception of the government's motion to sequester the jury. In addition, the government excludes the time from September 11, when it moved for a ruling on the admissibility of evidence relating to Bufalino's connections with La Cosa Nostra, to September 30, when that motion was decided.

(Footnote continued from previous page)

or in computing the time within which the trial of any such offense must commence:

(1) Any period of delay resulting from other proceedings concerning the defendant, including but not limited to—

* * * * *

(F) delay resulting from any pretrial motion, from the filing of the motion, through the conclusion of the hearing on, or other prompt disposition of, such motion.

* * * * *

(J) delay reasonably attributable to any period, not to exceed thirty days, during which any proceeding concerning the defendant is actually under advisement by the court.

* * * * *

(8)(A) Any period of delay resulting from a continuance granted by any judge on his own motion or at the request of a defendant or his counsel or at the request of the attorney for the Government, if the judge granted such continuance on the basis of his findings that the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial.

Appellant objects to this calculation on several grounds. The most cogent of these is that (J) limits the amount of time excludable for the consideration of pretrial motions. Under that subsection, which is reproduced in note 5 supra, a maximum of 30 days is excludable when a "proceeding concerning the defendant is actually under advisement by the court." In this case, a first round of motions was fully submitted by March 24, and a second round (which was precipitated by the filing of a superseding indictment) was fully submitted by May 26. As a result, even if a full period of advisement is allowed for each set of motions, only 60 of the 126 days between March 25 and July 28 are excludable by reason of subsection (J). The Government reads the statute differently. It contends that (J) and (F) should not be read together, that (F)—which does not impose a numerical limitation on the time it excludes—is the only subsection that applies to pretrial motions, and, apparently, that (J) refers to other (unspecified) proceedings that could concern a defendant.

The application of (J) to the period of time during which a trial judge considers pretrial motions is an issue of first impression in this circuit, see United States v. New Buffalo Amusement Corp., 600 F.2d 368, 373 n.5 (2d Cir.) (1979). While we think that a cursory reading of the two subsections lends some support to the government's position, a careful look at the legislative history of the Speedy Trial Act and its 1979 amendments makes that theory untenable.

We start with the 1974 Act, which provided that:

> (h) The following periods of delay shall be excluded . . . in computing the time within which the trial of any such offense must commence:
>
> (1) Any period of delay result from other proceedings concerning the defendant, including but not limited to—
>
> * * * * *

(E) delay resulting from hearings on pretrial motion;

* * * * *

(G) delay reasonably attributable to any period, not to exceed thirty days, during which any proceeding concerning the defendant is actually under advisement.

Under the 1974 Act, subsection (E), which is the predecessor of current subsection (F), was limited in scope. It was apparently aimed at excluding only the days on which pretrial motions were argued in court, and not the days from the filing of the motion to the hearing thereon, see Frase, The Speedy Trial Act of 1974, 43 U. Chi. L. Rev. 667, 692 (1976). Subsection (G), the predecessor of (J), who intended to deal with delay that arose after pretrial motions were submitted, as the following passage from the House Report that accompanied the bill makes clear:

> *Section 3161(h)(1)(g)* provides for the exclusion of time during which any proceeding concerning the defendant is under advisement. The Subcommittee added language which would limit to 30 days the time that each proceeding could be held under actual advisement. The amendment was adopted at the suggestion of Detroit defense attorney Mr. Barris, who said:
>
> > Now, I think the language, which is now contained within the bill is that a reasonable time should be allowed when a matter is held under advisement by the district judge. This, of course, is a very flexible term, term "reasonable," and I would suggest that a period of 30 days after all oral argument is heard and all briefs have been submitted on the matter under advisement is not an unreasonable period in which the district judge could act, I do not think that this would compel the judge to reach on any particular

> issue an improvident answer merely because he is held to a time limit of 30 days. And yet if such a provision or restriction were written into the Act, it would effectively plug up one of the loopholes which I conceive to now exist whereby a district judge were he prone to do so, could well "sit on a matter" for an indefinite period of time and thus rather effectively defeat the purposes of the bill.
>
> The Committee concurs with the views of Mr. Barris and also with the Alaska speedy trial rules of court, which provides that no pre-trial motion shall be held under advisement for more than 30 days. This modification in no way affects the prerogative of the court to continue cases upon its own motion where, due to the complexity or unusual nature of the case, additional time is needed to consider matters before the court, as set forth in section 3161(h)(8).

H.R. Rep. No. 93-1508, 93d Cong., 2d Sess. (1974), reprinted in 1974 U.S. Code Cong. & Admin. News 7401, 7425-26.

By 1979, the courts had obtained some experience with the Act, and Congress chose to amend certain portions to reflect that experience. Subsection (G) apparently had not caused the courts any problems, and it was not changed in 1979, except for a change in lettering to (J). Subsection (E), however, had led to controversy, and Congress decided to reword it to make its meaning more precise. The accompanying reports are revealing as to legislative intent:

> The provision of existing law relating to exclusion of periods of delay "resulting from hearings on pretrial motions" is revised to avoid an unduly restrictive interpretation of the exclusion as extending only to the actual time consumed in a pretrial hearing. The committee approves the expansion of this exclusion to "delay resulting from any

> pretrial motion, from the filing of the motion, through the conclusion of the hearing on, or other prompt disposition of, such motion" with the intention that potentially excessive and abusive use of this exclusion be precluded by district or circuit guidelines, rules, or procedures relating to motions practice.

H.R. Rep. No. 96-390, 96th Cong., 1st Sess. (1979), reprinted in 1979 U.S. Code Cong. & Admin. News 805, 814. And more significantly.

> Finally, the section provides exclusion of time from filing to the conclusion of hearings on or "other prompt disposition" of any motion. This later language is intended to provide a point at which time will cease to be excluded, where motions are decided on the papers filed without hearing. *In using the words "prompt disposition", the committee intends to make it clear that, in excluding time between filing and disposition on the papers, the Committee does not intend to permit circumvention of the 30 days, "under advisement" provision contained in Subsection (h)(1)(J).* Indeed, if motions are so simple or routine that they do not require a hearing, necessary advisement time should be considerably less than 30 days. Nor does the Committee intend that additional time be made eligible for exclusion by postponing the hearing date or other disposition of the motions beyond what is reasonably necessary.

S. Rep. No. 96-212 96th Cong., 1st Sess. 33-34 (1979), reprinted in Federal Judicial Center, Legislative History of Title I of the Speedy Trial Act 115 (1980) (emphasis added).

These excerpts make it clear to us that the term "proceeding" in subsection (3) was very much intended to encompass pretrial motions. Furthermore, this view is reinforced by contemporaneous and informed administrative interpretation. The Administra-

tive Office of the United States Courts has issued guidelines to aid the courts in applying the Speedy Trial Act, which were prepared, in part, by the Committee on the Administration of the Criminal Law of the Judicial Conference of the United States. While these guidelines are not binding, the interpretation they espouse is persuasive. These guidelines state flatly that:

> *(J) Proceedings Under Advisement*
>
> *General.* This exclusion covers the time required for the court to consider a motion. Although the excludable period under this subparagraph is limited to thirty days, additional time required to consider a motion may in some cases warrant a continuance of the trial date under paragraph (h)(8).
>
> *Starting Date.* The starting date is the day following the date on which the court has received everything it expects from the parties, examining physicians, etc., before reading a decision. It is normally the date following the expiration of an exclusion under subparagraph (A), (B), (F), or (G).
>
> *Ending Date.* The ending date is the earliest of (1) the date the judge's decision is filed, (2) the date the judge renders his decision orally in open court, or (3) the expiration of the 30-day maximum period.

Guidelines to the Administration of the Speedy Trial Act of 1979, as Amended 42-43 (1981). This interpretation is also reflected in the Administrative Office Speedy Trial Advisory Issuance #32 (August 1981) at Chart B, page 3 ("Defendant Motion Under Advisement. The exclusion covers the time required for the court to consider a motion. . . . [T]he excludable period under this subparagraph is limited to thirty days. . . ."). Similarly, the 1979 Plan for the Prompt Disposition of Criminal Appeals of the United States District Court for the Southern District of New York noted that "in some instances docket clerks are not aware of when a judge takes a motion under advisement. This

date is important as it starts excludable time running for up to 30 days under § 3161(h)(1)(J)." Plan at III-9. See also Misner, The 1979 Amendments to the Speedy Trial Act: Death of the Planning Process, 32 Hast. L.J. 635, 654-55 (1981).

Moreover, the scanty caselaw on the issue supports these administrative interpretations. It is true that the government cites two circuit court decisions to us for the proposition that the 30-day time limit of (J) is not applicable. However, it is not that either case is directly on point. For example, in United States v. Brim, 630 F.2d 1307 (8th Cir. 1980), cert. denied, 452 U.S. 966 (1981), it seems that the pretrial period extended for an inordinate length of time because the parties filed many consecutive motions and that at no time was a single motion under advisement for longer than 30 days. ("From [October 23, 1979], overlapping filings by the defendants and the government kept motions pending continuously until December 19, 1979, when the district court disposed of the motions remaining before it. . . ." Id. at 1312.[6] On the other hand, the Seventh Circuit considered the precise issue in United States v. Raineri, 670 F.2d 702 (1982). There, motions were fully submitted by August 1, but the magistrate did not decide them until October 28, 88 days later. Apparently agreeing with the interpretation advanced by appellant here, that court held that "[i]t is reasonable to attribute and exclude *thirty of the days* between August 1 and October 28 to the motions under advisement.'" Id. at 708 (emphasis added); cf. United States v. Molt, 631 F.2d 258, 262 (3d Cir. 1980) (per curiam).

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[6] In the other case relied on by the government, United States v. Regilio, 668 F.2d 1169 (7th Cir. 1981), it is unclear whether the court had the motions under advisement for over 30 days or whether overlapping motions were filed in a way that prolonged the pretrial period. In a later case, however, *Regilio* was cited by the Seventh Circuit after it stated that it would exclude only 30 pretrial days under (J). United States v. Raineri, 670 F.2d 702, 708 (7th Cir. 1982), discussed in the text infra.

Based upon all of the above, therefore, we reject the government's position that the 30-day limitation of subsection (J) is inapplicable.[7] We are aware that this interpretation places a burden on district judges to decide motions rapidly. We believe, however, that it carries out the meaning of the Act. Furthermore, should the 30-day limit place an unduly harsh burden on a trial judge, it is always open to him to find that the interest of justice is best served by granting a continuance under § 3161(h)(8) for the excess period, see H.R. Rep. No. 93-1508, supra.

The government argues also that defendants' failure to respond to the government's sequestration motion renders the entire period from the time that the motion was filed to the date of trial excludable under subsection (F). The sequestration motion had been filed on March 27, but neither Bufalino nor his co-defendant, Rizzitello, responded to it. On September 30, during a pretrial conference, the judge asked counsel if they objected to sequestration and, after expressing his own reservations about the practice, stated that he would not do it unless the defense counsel joined in the Government's motion.[8] Although at that

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[7] It is therefore unnecessary to reach appellant's objection to the date upon which the government contends that the (F) exclusion begins. Bufalino claims that the scheduling of pretrial motions was not formally begun until January 22. More important, appellant maintains that the exclusion does not begin until motions are actually filed, which was March 9 in this case.

[8] The September 30 colloquy, as it pertained to the sequestration motion, was as follows:

> THE COURT: The only thing which is of long standing is the motion to sequester the jury. That is number one.
>
> Does anyone object to the motion to sequester the jury?
>
> You do?
>
> MR. COHEN [attorney for Rizzitello]: No, your Honor.
>
> THE COURT: You agree that the jury should be sequestered?
>
> MR. GELSO: I do on behalf of Bufalino.
>
> MR. COHEN: I have no objection.

(Footnote continued on following page)

time neither counsel objected to sequestration. Rizzitello's attorney refused to join in the motion without further discussion with Bufalino's counsel. The matter was again brought up by the court on October 19, the date that the trial began. At that time, the following interchange took place:

> THE COURT: I will once again state that I'm not crazy about sequestered juries. However, I gather that everybody wants a sequestered jury in this case.
>
> MR. COHEN: [attorney for Rizzitello]: Your Honor, excuse me.
>
> I contacted your chambers on that day when we had the conference and indicated we didn't take any position.
>
> THE COURT: Not taking a position is a kind of indication that you don't disagree with the motion, which is kind of like saying we'll have a sequestered jury.
>
> Under the circumstances I will assume that everybody in this case is willing to work much harder than normally, and under the circumstances we are going to work harder.

In view of these facts, we believe that the government's argument to us on this point has merit. Because Judge Duffy was opposed to sequestration, his decision on the government's motion hinged on the defendants' positions towards it. If either one

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(Footnote continued from previous page)

> THE COURT: I tell you, I assume you guys have thought about it, that is like notifying the jury that we have "dangerous people floating around someplace."
>
> MR. GELSO: I would hope the Court would give an appropriate instruction.
>
> THE COURT: I don't care what I do. They are going to sit in a motel and think about it. I am against sequestering a jury. And as of now I won't do it unless all three of you join in and sequester them.
>
> MR. COHEN: I am going to meet with Mr. Gelso after we leave here. We haven't had time to talk about this. We will give your Honor our feelings on this, perhaps this afternoon.

had shared his views of the dangers in sequestration, it is not unlikely that the government's motion would have been denied. Consequently, Judge Duffy could not have taken this motion under advisement in any meaningful way until the defendants made their positions known. Moreover, administration of the Speedy Trial Act has posed difficulties, as the Southern District's summary of its experience indicates, see Southern District Plan, supra, III. Over 750 criminal cases were filed in the Southern District in the year ending June 30, 1981, see Administrative Office of the United States Courts, Management Statistics for 1981 26 (1981), far too many for it to be reasonable to require the clerks adversary's motions in order to calculate times under the Speedy Trial Act. Cf. Misner, supra at 643 n.65. It seems to us that Bufalino, when faced with a government motion, had a duty to do more than stand by without taking a position and then reap the benefit of inaction by having the indictment dismissed on speedy trial grounds.

In finding that (F) applies to the entire period that followed the filing of the government's sequestration motion, we do not mean to say that appellant's failure to respond works as a waiver of his rights. The responsibility for pursuing a prosecution lies entirely with the government, Barker v. Wingo, 407 U.S. 514, 527 (1972) ("A defendant has no duty to bring him to trial. . . ."); *New Buffalo Amusement Corp.*, 600 F.2d at 375-76; United States v. Didier, 542 F.2d 1182, 1189 & n.9 (2d Cir. 1976). Cf. United States v. Saltzmann, 548 F.2d 395, 401 (2d Cir. 1976). We must however, insure the ability of the courts to administer the Act. If defendants do not make their positions known in response to the motions that are made, neither the court nor its clerk's office will ever know when the "under advisement" period of subsection (J) begins to run. The Act was not, after all, meant to provide defendants with tactics for ensnaring the courts into situations where charges will have to be dismissed on technicalities. *Regilio*, 669 F.2d at 1173; cf. Furlow v. United States,

664 F.2d 764, 768 (9th Cir.) (per curiam), cert. denied, 102 S.Ct. 340 (1981). In addition, we caution the Government that we will not in the future condone its willingness to stand silent in similar situations. As *Barker* v. *Wingo*, 407 U.S. at 527, makes clear, the government is charged not only with preserving society's interest in bringing criminals to justice; it is also charged with protecting society's interest in swift prosecutions. In the future, a defendant's failure to respond to a motion within a reasonable time should be brought to the court's attention.

Because we find that the entire period from March 27 to October 19 is excludable under subsection (F), we do not reach the government's alternative theories for the calculating the exclusion.[9] Taking the approach most favorable to appellant on the question of when motion practice began under subsection (F),[10] Bufalino was tried 59 days after his arraignment, well within the 70-day period allowable under the Speedy Trial Act.

II. Rulings on Evidence

Appellant's claims with regard to the evidence introduced at trial are without merit. First, he argues that the trial court should

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[9] The government also argues that speedy trial time should not begin to run until Bufalino appeared in person on May 8, see note 3 supra; that excludable time begins from the moment that the court determines that pretrial motions would be needed (here, January 9); and that Bufalino's September 30 motion in a continuance waived his speedy trial rights. In addition, the government asserts that the time from October 5, when the trial was scheduled to begin, to October 19, the date upon which it actually began, is excludable under §3161(h)(8) because Judge Duffy was busy trying another case. Although (h)(8) requires the trial court to make a finding "that the ends of justice . . . outweigh the best interest of the public and the defendant in a speedy trial," the government maintains that we can make this finding *nunc pro tunc*.

[10] See notes 7 & 9 supra. Under this approach, the entire time from January 9, when defendants were arraigned, to March 9, when motions were filed, is counted toward the 70-day statutory period.

not have allowed the government to cross-examine him about his friendships with members of La Cosa Nostra or about his presence in Apalachin on November 14, 1957.[11] While we agree that this line of interrogation poses the danger of allowing the jury to find Bufalino guilty by virtue of his association with known gangsters and his presence at a famous gangland convention, we feel that the cross-examination was proper.

The theory that the government presented to the jury was that Bufalino could prevail upon James Fratianno to have Napoli killed because both were members of La Cosa Nostra, an organization whose members performed murders for one another as a matter of professional courtesy. When, on direct examination, Bufalino claimed that his acquaintance with Fratianno was based on "chance meetings," it became proper for the government to impeach him by introducing evidence of appellant's longstanding relationship with La Cosa Nostra, see United States v. Havens, 446 U.S. 620, 626 (1980) ("when defendants testify, they must testify truthfully or suffer the consequences"); United States v. Miller, 478 F.2d 1315, 1318 (2d Cir.), cert. denied, 414 U.S. 851 (1973). Furthermore, since without this evidence it was unlikely that the jury would believe that Fratianno would agree to commit the crime, we think the trial judge properly exercised his discretion to allow the cross-examination of defendant to proceed, see United States v. Sanzo, 673 F.2d 64, 70 (2d Cir. 1982).

Bufalino's other evidentiary objection is that the tape recording of the extortion threat should not have been admitted because it was highly prejudicial. The general rule is that "other crimes" evidence "is not admissible to prove the character of a person

[11] Appellant's presence at the notorious La Cosa Nostra convention in Apalachin was the subject of his prosecution for conspiracy to obstruct justice and commit perjury. His conviction on those charges was reversed by this court, United States v. Bufalino, 285 F.2d 408 (2d Cir. 1960).

in order to show that he acted in conformity therewith." Fed. R. Evid. 404(b). Such evidence of "other crimes" is, however, permissible for purposes of impeachment, United States v. Benedetto, 571 F.2d 1246, 1250 (2d Cir. 1978), and to show motive or intent, Fed. R. Evid. 404(b), United States v. Bradwell, 388 F.2d 619, 622 (2d Cir.), cert. denied, 393 U.S. 867 (1968). In this case, the tape recorded threat served the double purpose of negating Bufalino's testimony that he never told anyone to kill Napoli and establishing his motive for seeking Napoli's death. Moreover, Judge Duffy gave the jury two curative instructions. Right after the tape was played, the jury was told to disregard the obscenities it contained. More importantly, in his charge, the judge said:

> [Y]ou heard a tape . . . of what the defendant Bufalino said on one occasion to Jack Napoli. You know that Bufalino has already been convicted of making that threat. You are not called upon to consider that tape that you heard as anything except something which may assist you in determining the question of intent in this case, only in connection with that.

We think that this charge was sufficient to alert the jury to the danger of improperly using the tape as evidence that Bufalino endeavored to obstruct justice. Admission of the tape therefore was not reversible error.

III. The Judge's Charge

Finally, Bufalino objects to the court's failure to give the accomplice instruction that Bufalino requested. Fratianno and Fox, the two principal witnesses for the prosecution, both received—or stood to receive—substantial benefits from the government. Fratianno received a favorable plea bargain on another charge, immunity from prosecution on the criminal activities that he testi-

fied about and approximately $200,000 as part of the Justice Department's Witness Protection Program. Fox expected to receive early parole and an opportunity to participate in the Protection Program. Although this information was brought out at the trial, the judge's charge on how their testimony should be evaluated was somewhat equivocal. Specifically, he instructed the jury as follows:

> If you find . . . that an informer believes that he has a real interest in the outcome of this case, then you can consider that, also, in determining his credibility.
>
> For example, if a person here, informer believes that his term of imprisonment may be shortened, not because of his testimony, but because of the outcome of the case, all right, then he has a real interest in the outcome of the case. He might be said to have an interest anyway in the case from the very fact that he is testifying.
>
> I am not saying and I don't want you to understand that the law imposes this, I am not saying that because a person has an interest that means that they would testify falsely, I am just saying it is something for you to consider. It is something that you determine what weight it will have.

This instruction was arguably inadequate because it asked the jury to devalue Fox's and Fratianno's testimony only if the jury found that their receipt of benefits was contingent on the convictions of Bufalino. We have stated in the past that "trial judges should call the jury's attention to their duty to scrutinize the testimony of accomplices and informers." United States v. Swiderski, 539 F.2d 854, 860 (2d Cir. 1976). This admonition applies to all factors affecting credibility that have been brought out at trial, not merely an interest in the outcome of the case. We do not, however, find that this possible inadequacy in the charge requires a reversal of Bufalino's conviction. The jury

received ample evidence of the interest of these witnesses, and could be counted on to use its common sense in evaluation the truth of their testimony. Besides, the defense summation—which referred to Fratianno as a "chronic pathological liar" to whom the government paid $200,000 "that might buy a lie"—more than compensated for the judge's omission. See United States v. Velez, 652 F.2d 258, 261 n.5 (2d Cir. 1981).

For the foregoing reasons, the judgment of conviction is affirmed.

Judgment of the Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the fifteen day of June, one thousand nine hundred and eighty-two.

Present:

HON. WILFRED FEINBERG, *Ch.J.*
HON. JAMES L. OAKES, *Circuit Judge*
HON. DANIEL M. FRIEDMAN, *Chief Judge,* U.S. Court of Claims

UNITED STATES OF AMERICA,

Appellee,

v.

RUSSELL BUFALINO,

Defendant-Appellant.

#81-1474

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed in accordance with the opinion of this court.

A. Daniel Fusaro, Clerk
by Edward J. Guardaro,
Deputy Clerk

Order Denying Petition for Rehearing

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 4th day of August, one thousand nine hundred and eighty-two.

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

—v.—

RUSSELL BUFALINO,

Defendant-Appellant.

#81-1474

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the defendant-appellant, Russell Bufalino,

Upon consideration by the panel that heard the appeal, it is ORDERED that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge on the panel that heard the appeal and that no such judge has requested that a vote be taken thereon.

A. Daniel Fusaro, Clerk

by:
Francis X. Gindhart
Chief Deputy Clerk

Statutes Involved

Chapter 208–Speedy Trial

18 U.S.C. Section 3161–Time Limits and Exclusions

"(c)(1) In any case in which a plea of not guilty is entered, the trial of a defendant charged in an information or indictment with the commission of an offense shall commence within seventy days from the filing date (and making public) of the information or indictment, or from the date the defendant has appeared before a judicial officer of the court in which such charge is pending, whichever date last occurs.

(h) The following periods of delay shall be excluded in computing the time within which an information or an indictment must be filed, or in computing the time within which the trial of any such offense must commence:

(1) Any period of delay resulting from other proceedings concerning the defendant, including but not limited to–

(F) delay resulting from any pretrial motion, from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of such motion;

(6) delay reasonably attributable to any period, not to exceed thirty days, during which any proceeding concerning the defendant is actually under advisement by the court.

Second Circuit: Guidelines under the Speedy Trial Act (Jan. 16, 1979)

2. *Time for Making Motions–Excluded Time*

(a)(i) In the case of a motion which the Court has determined requires the filing of written papers, unless the Court, for good cause, grants additional time, the motion papers shall be filed within ten (10) days after the Court has made its determination, opposing papers shall be filed within ten (10) days and reply papers, if any, shall be filed within three (3) days thereafter. If the Court desires oral argument or post-argument submissions, oral argument shall be held at such time as the Court directs, but no later than ten (10) days after the date on which reply papers are due, and post-argument submissions, if any, shall be due five (5) days after oral argument.

Southern District of New York: Local Rules Governing Criminal Cases

Rule 3. *Motions*

To curtail undue delay in the administration of criminal justice, this Court may hereafter refuse to hear all motions under Rules 7(f), 15(a), and 16 of the Federal Rules of Criminal Procedure, unless counsel for the moving party certifies to the Court that he has conferred with his adversary in an effort in good faith to resolve by agreement the issues raised by the motion, without the intervention of the Court, and has been unable to reach such an agreement.

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FIL
DEC 10 1982
ALEXANDER L. STEVAS,
CLERK

No. 82-596

In the Supreme Court of the United States

OCTOBER TERM, 1982

RUSSELL BUFALINO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a defendant's failure to respond to a government pretrial motion tolls the time limits of the Speedy Trial Act, in circumstances where the district court makes clear that no disposition of the motion will be made until the defendant's position is established.

2. Whether the district court's instructions to the jury respecting the credibility of accomplices were adequate.

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In the Supreme Court of the United States

OCTOBER TERM, 1982

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RUSSELL BUFALINO, PETITIONER

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-19a) is reported at 683 F.2d 639.

JURISDICTION

The judgment of the court of appeals (Pet. App. 20a) was entered on June 15, 1982, and a petition for rehearing was denied on August 4, 1982 (Pet. App. 21a). The petition for a writ of certiorari was filed on October 4, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of New York, peti-

tioner was convicted of conspiring to violate the civil rights of a United States citizen by entering an agreement to murder a federal witness, in violation of 18 U.S.C. 241, and of endeavoring to obstruct justice by commissioning others to murder the witness, in violation of 18 U.S.C. 1503. He was sentenced to 10 years' imprisonment and fined $10,000 on the conspiracy count. He was also sentenced to a concurrent term of five years' imprisonment and fined $3,000 on the obstruction count. The court of appeals affirmed.

1. The evidence is summarized in the opinion of the court of appeals (Pet. App. 2a-3a). Petitioner is a boss in a Pennsylvania-based organized crime "family." In April 1976 a federal grand jury sitting in the Southern District of New York was investigating a charge that petitioner had used extortionate means to collect a $25,000 debt from one Jack Napoli. Napoli testified before the grand jury and thereafter became a participant in the Justice Department's Witness Protection Program. He was secretly relocated by the United States Marshal's Service to Walnut Creek, California. In August 1976, petitioner met with his co-defendant, Michael Rizzitello, in a New York restaurant and told Rizzitello that Napoli was living in Walnut Creek and that he wanted Napoli killed. One month later, Rizzitello told James Fratianno, the acting head of the Los Angeles Cosa Nostra, that petitioner wished to have Napoli killed, and arranged a meeting between Fratianno and petitioner to discuss the murder. The two men met a few days later, and petitioner described Napoli to Fratianno and told Fratianno that Napoli had opened a pork business in Walnut Creek. When Fratianno returned to California, he unsuccessfully looked for Napoli.

In October 1976, petitioner was indicted on charges stemming from the extortion of Napoli. He was tried a year later. Napoli testified for the prosecution. Petitioner was convicted and sentenced to four years' imprisonment. While serving his extortion sentence in the Danbury Federal Correctional Center in Connecticut, petitioner met fellow inmate Steven Fox, a member of the Pagan motorcycle gang. Fox was given a parole date of July 18, 1980, but he was required to secure a job and a place to live as a condition of parole. Petitioner obtained a job for Fox with a trucking firm, but told Fox that he would be expected to perform a favor for petitioner in exchange for the job. The favor demanded was the murder of Napoli. Petitioner told Fox that his employer at the trucking firm would provide him with Napoli's name and address. Fox was paroled, worked for only a few days, and fled to Florida before the necessary information was conveyed.

2. Prior to petitioner's trial in the instant case, on March 27, 1981, the government moved to sequester the jury. Neither petitioner nor his co-defendant responded to the motion in any fashion. Six months later, when neither defendant had yet responded, the district court questioned defense counsel as to their position and indicated its reluctance to sequester the jury unless defendants agreed to sequestration. The court noted with concern that the sequestration might be "like notifying the jury that we have 'dangerous people' floating around someplace" (Pet. App. 12a-13a n.8). Defense counsel informed the district court that they had not yet had time to confer about the motion and would state their position later. The court again asked for the defendants' response on the day of trial, October 19, 1981. At that time defense counsel informed the court that defendants would

take no position on sequestration. Because defendants did not oppose sequestration, the motion was granted. Petitioner then moved to dismiss the indictment for an alleged violation of the Speedy Trial Act, 18 U.S.C. (& Supp. V) 3161 *et seq.*, and in the alternative requested that trial be continued. Both motions were denied.

On appeal, petitioner's speedy trial claim focused on the seven-month period during which the government's sequestration motion was pending. The government argued that the entire period should be excluded from speedy trial calculation, under 18 U.S.C. (Supp. V) 3161(h)(1)(F), which provides for exclusion of time elapsed while any pretrial motion is pending. Petitioner argued, however, that 18 U.S.C. (Supp. V) 3161(h)(1)(J), which provides for the exclusion of time "not to exceed thirty days, during which any proceeding concerning the defendant is actually under advisement by the court," limits to 30 days the time excludable because of the pendency of the sequestration motion. The court of appeals rejected the government's contention that Section 3161(h)(1)(J) had no application here, concluding that only 30 days of elapsed time may be excluded once a pretrial motion has actually been taken under advisement (Pet. App. 6a-12a).[1] The court accepted, however, the government's alternative contention that because of the defendants' failure to respond to the sequestration motion, it was not taken under advise-

[1] The court cited with approval (Pet. App. 9a-10a) Speedy Trial Act guidelines issued by the Administrative Office of the United States Courts, specifying that a motion should be deemed to have been taken under advisement only when the court has received everything it expects from the parties that bears upon the particular motion.

ment at any time prior to October 19. Stressing the unusual factual circumstances, the court of appeals explained (Pet. App. 13a-14a):

> Because Judge Duffy was opposed to sequestration, his decision on the government's motion hinged on the defendants' positions towards it. If either one had shared his views of the dangers in sequestration, it is not unlikely that the government's motion would have been denied. Consequently, Judge Duffy could not have taken this motion under advisement in any meaningful way until the defendants made their positions known.[2]

The court also commented (*id.* at 14a) that petitioner,

> when faced with a government motion, had a duty to do more than stand by without taking a position and then reap the benefit of inaction by having the indictment dismissed on speedy trial grounds.

The court admonished the government, however, that in future cases a defendant's failure to respond to a government motion should be brought to the district court's attention (Pet. App. 15a).

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[2] The petition appendix omits a line from a sentence of the court of appeals' opinion which follows by one sentence the quoted passage. The sentence in question (with the portion omitted from the petition appendix italicized) reads (683 F.2d at 646):

> Over 750 criminal cases were filed in the Southern District in the year ending June 30, 1981, see Administrative Office of the United States Courts, Management Statistics for 1981 26 (1981), far too many for it to be reasonable to require the clerks *or the judges to guess each party's position on his* adversary's motions in order to calculate times under the Speedy Trial Act.

ARGUMENT

1. The decision of the court of appeals respecting petitioner's Speedy Trial Act claim is manifestly correct, and there is no suggestion that it conflicts with any decision of any other court. Further review of the fact-bound issue presented is accordingly unwarranted.

a. Petitioner prevailed on the major legal issue respecting the Speedy Trial Act presented to the court of appeals. Thus the court of appeals held that, notwithstanding the expansive language of 18 U.S.C. (Supp. V) 3161(h)(1)(F), which on its face requires exclusion from speedy trial reckoning of time elapsed during the pendency of a pretrial motion "from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of, such motion," and notwithstanding the fact that no hearing was held on the sequestration motion, only 30 days of time could be excluded after the motion was taken under advisement.[3] The judgment of the court of appeals adverse to petitioner rests, therefore, upon

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[3] The court of appeals' decision in this respect appears to be at odds with decisions of several other courts of appeals. See, e.g., *United States* v. *Fogarty*, No. 82-1323 (8th Cir. Nov. 10, 1982); *United States* v. *Regilio*, 669 F.2d 1169 (7th Cir. 1981); *United States* v. *Brim*, 630 F.2d 1307 (8th Cir. 1980), cert. denied, 452 U.S. 966 (1981). Consistent with the decision of the court of appeals on this point is *United States* v. *Raineri*, 670 F.2d 702, 708 (7th Cir. 1982). See also *United States* v. *Molt*, 631 F.2d 258, 262 (3d Cir. 1980). The court of appeals below thought *Brim* and *Regilio* to be reconcilable with its decision and obviously did not have *Fogarty* before it. In any event, because petitioner prevailed on this issue, there is no occasion to determine whether there is a conflict requiring resolution on this score, much less to resolve any conflict, in this case.

the court's fact-bound ruling that under the circumstances of this case, the government's sequestration motion could not be treated as having been taken under advisement at any time prior to the date upon which the defendants put on the record their position respecting that motion, and that the time from the filing of the motion until its disposition on that same date was accordingly excludable under 18 U.S.C. (Supp. V) 3161(h)(1)(F).

Petitioner contends (Pet. 5-9) that the entire period at issue is excludable only if the motion is decided "promptly," and he complains that seven months is not "prompt." But this contention is misplaced on the present record, as is demonstrated by the legislative history of Section 3161(h)(1)(F), which fully supports the result reached by the court below. As originally enacted, the pretrial motion provision was narrow, excluding only "delay resulting from hearings on pretrial motions." 18 U.S.C. 3161(h)(1)(F). Thereafter, Congress was concerned that the Act was not being interpreted with sufficient flexibility. See S. Rep. No. 96-212, 96th Cong., 1st Sess. 17-20 (1979). Thus, in 1979, Congress revised the pretrial motion exclusion to embrace the entire period from "the filing of the motion through the conclusion of the hearing on, or other prompt disposition of, such motion." Speedy Trial Act Amendments of 1979, Section 4, 93 Stat. 327-328; see S. Rep. No. 96-212, *supra*, at 34. The Senate Report explains what Congress meant by the phrase "prompt disposition" (*ibid.*):

> Finally, the section provides exclusion of time from filing to the conclusion of hearings on or "other prompt disposition" of any motion. This later language is intended to provide a point at which time will cease to be excluded,

where motions are decided on the papers filed without hearing.

While the intended operation of Section 3161(h)(1)(F) when no hearing is held is not entirely clear (see page 4 and page 6 & note 3, *supra*), it is certain that the Section 3161(h)(1)(F) exclusion runs from the filing date of a motion at least until the date of the conclusion of any hearing or, when no hearing is held, at least until the date on which the court receives all pleadings and information from the parties necessary to its decision—in other words, the date on which the motion is ripe for decision and taken under advisement. Because the delay in disposition of the sequestration motion in this case is attributable to petitioner and his co-defendant, petitioner cannot complain of any failure promptly to dispose of the government's motion. There simply was nothing before the court ripe for disposition until the defendants had made their position known.

There is no occasion to review the court of appeals' conclusion that the district court properly deferred taking the sequestration motion under advisement. The court of appeals' decision is narrowly framed and closely tied to the specific facts in the record: the nature of the motion involved, the district court's solicitation of defendants' position, and the clear indication given counsel that the ruling was likely to hinge upon their response (see Pet. App. 13a-14a). Thus, the decision announced no rule of general applicability. And the decision is clearly correct given the facts presented, for defendants could well be expected to oppose the sequestration motion and would undoubtedly have complained upon appeal had an objection to sequestration been brushed aside as tardy. Thus the deci-

sion of the court of appeals does not create "a loophole in the Act which will give trial courts complete discretion in the scheduling of criminal trials," as petitioner claims (Pet. 9). This claim is especially devoid of foundation given the court of appeals' admonition to the government (Pet. App. 15a) to report in future cases to the district court any defendant's failure to respond within a reasonable time to a government motion.

As petitioner notes (Pet. 8), Congress was aware that the expanded pretrial motion exclusion created by the 1979 Speedy Trial Act Amendments created a potential loophole through which large chunks of time could slip. S. Rep. No. 96-212, *supra*, at 34. It accordingly recommended that district or circuit guidelines be drafted to prevent abuse of 18 U.S.C. (Supp. V) 3161(h)(1)(F). *Ibid.* But this legislative history necessarily supports the court of appeals' conclusion that the time elapsed here was not rendered nonexcludable by the language of Section 3161(h)(1)(F) as amended in 1979. And there is no suggestion that the *district court* violated applicable speedy trial guidelines or plan provisions by its failure to take the government's motion under submission before receiving a response. Instead, petitioner relies upon Second Circuit guidelines allowing *parties* 10 days to respond to a pretrial motion (Pet. 9). Petitioner, of course, did not comply with those guidelines. It may well be that the district could would not have abused its discretion had it treated petitioner's failure to respond within 10 days as an acquiescence in the government's motion. It does not follow, however, that the district court abused its discretion by insisting instead upon hearing petitioner's position, if any, respecting the sensitive issue of sequestration,

before taking the motion under advisement. In any event, petitioner's claim that the Second Circuit misapplied its own Speedy Trial Act guidelines plainly presents no issue for this Court.

b. Petitioner also argues (Pet. 9-11), however, that a defendant may not "waive" his rights under the Speedy Trial Act,[4] and hence that the clock should have continued to run despite his failure to respond to the sequestration motion. But, as the court of appeals explained (Pet. 14a), its decision does not rest upon any theory of waiver. Petitioner's failure to respond to the sequestration motion was not treated as a waiver of any rights—it merely extended the excludable period prescribed by the Act itself. Similarly, whenever a defendant files a pretrial motion, takes an interlocutory appeal, or submits to a competency examination, he stops the speedy trial "clock." But those actions cannot properly be analyzed as waivers of the right to be tried within 70 includable days of indictment. In short,

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[4] The Speedy Trial Act is silent on the question of waivers. The Senate report, however, states that it would be contrary to the primary purpose of the Act to permit defendants to waive the 70-day limit. S. Rep. No. 96-212, *supra*, at 29. The Act's primary purpose is to protect the public's right to a speedy trial. The public has an interest in seeing that criminals are brought to book swiftly, and therefore a defendant should not be permitted to slow the criminal process. Congress recognized that it is often in the defendant's interest to delay the trial in order to postpone his imprisonment. Congress thus exhorted the courts not to accept waivers. But nothing in the legislative history suggests that the courts must prevent even forms of delay sanctioned by the Act, subordinating every other consideration, including the fundamental values of our adversary system of justice implicated here, to the goal of expedition.

the question whether a defendant can waive the 70-day limit of the Act is not presented here.

2. Petitioner also contends (Pet. 12-14) that the district court committed reversible error when it refused to instruct the jury that the testimony of accomplices should be "scrutinized with care and caution." On the contrary, the court was under no obligation to use the precise language requested by petitioner. When viewed as a whole (see *Cupp* v. *Naughten*, 414 U.S. 141, 146-147 (1973)), the instruction given adequately conveyed the same message, especially when considered in the context of the particular accomplice testimony received at trial.

a. Both Fox and Fratianno, the two men engaged by petitioner to kill Napoli, testified for the government. Defense counsel cross-examined them vigorously and at the close of the evidence argued that Fratianno was a "pathological liar" and that neither he nor Fox should be believed (Tr. 765-766). The court then instructed the jurors that they must "pass upon the credibility of the witnesses" and "resolve such differences as there may be between their testimony" (Tr. 790). In determining credibility the court instructed the jury to use its "every day common sense" (Tr. 794) and enumerated various relevant factors, including "demeanor, [the witness'] lack of candor, his or her ability to express themselves, possible interest that the witness might have, possible bias, the strength of recollection, the accuracy of their recollection, [and] the witness' background" (Tr. 794). The court went on to state that a prior criminal act or "any immoral or discreditable act" could be taken into account, but that it was up to the jury to determine its weight (Tr. 794). Of course, the prior felony convictions and the

numerous criminal acts of both of the accomplices were in evidence. The jury was also alerted to the plea bargain Fratianno received on another charge, the grant of immunity that he received respecting the events he testified about, and the sums he received through his participation in the Department of Justice Witness Protection Program, as well as Fox's expectancy for early parole, and opportunity to join the witness protection program.

The court also charged the jurors that they "may consider whether a witness has a possible interest in the outcome of this case" (Tr. 794). With respect to Fratianno's and Fox's testimony, the court specifically instructed (Tr. 796):

> If you find * * * that an informer believes that he has a real interest in the outcome of this case, then you can consider that, also, in determining his credibility.

The court then gave the following example (Tr. 797):

> For example, if a person here, informer believes that his term of imprisonment may be shortened, not because of his testimony but because of the outcome of the case, alright, then he has a real interest in the outcome of the case. He might be said to have an interest anyway in the case from the very fact that he is testifying.

This example was an obvious reference to Fox, who had testified that he hoped his cooperation would result in reduction of his jail term (Tr. 444). The court further charged that the jury could consider past lies or contradictions, a reference that related mainly to Fratianno, who was cross-examined about many prior inconsistent statements (e.g., Tr. 257-

258) and prior lies under oath (e.g., Tr. 104-105, 174, 178, 185). The court concluded its discussion of accomplice testimony by remarking (Tr. 797):

> I am not saying and I don't want you to understand that the law imposes this, I am not saying that because a person has an interest that means they would testify falsely, I am just saying that it is something for you to consider. It is something that you determine what weight it will have.

The court concluded its charge on credibility by instructing the jurors that if they found a witness had lied at the trial they could "disregard that part which * * * [they] find to be a lie or * * * disregard all of the witness' testimony or * * *pick and choose" (Tr. 797).

b. The court of appeals held that the instructions given did not constitute reversible error (Pet. App. 17a-19a). Characterizing the portion of the instructions directed specifically at the credibility of the accomplices' testimony as "somewhat equivocal" and "arguably inadequate,"[5] the court was concerned that these instructions viewed in isolation highlighted one consideration relevant to the determination of accomplice credibility—interest in the outcome of the trial—to the exclusion of others (Pet. App. 18a). But the court concluded (*id.* at 19a) that the jury

> received ample evidence of the interest of [the accomplice] witnesses, and could be counted on to use its common sense in evaluati[ng] the

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[5] Petitioner thus exaggerates in representing (Pet. 13) that the "Second Circuit * * * agreed that this instruction was 'equivocal' and 'inadequate.' "

truth of their testimony. Besides, the defense summation—which referred to Fratianno as a "chronic pathological liar" to whom the government paid $200,000 "that might buy a lie"—more than compensated for the judge's omission.

c. Petitioner's challenge to the court of appeals' ruling is without merit. Petitioner acknowledges that the failure to give the instruction he sought is not reversible error in every case, but argues that the instruction given here served improperly to bolster the credibility of accomplice witnesses "by excluding from the jury's consideration crucial impeachment evidence" (Pet. 13). But the passages singled out by petitioner simply do not have that effect.[6] At most, they have the quite different (and less serious) imperfection suggested by the court of appeals—they do not include all of the factors that might cause a fact finder carefully to scrutinize the testimony of any accomplice. But this defect, if it was one, was merely an omission and not a direction to ignore any relevant matter. It was accordingly fully remedied by the balance of the district court's instructions, which addressed every material consideration. Indeed, the district court's penultimate statement on the subject of accomplice testimony, to

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[6] Petitioner quotes selectively from the passages in question (Pet. 13), omitting the district court's explanation of its statement (see Pet. App. 18a) that interest warranting special scrutiny of accomplice testimony would be established by the accomplice's belief "that his term of imprisonment may be shortened, *not because of his testimony but because of the outcome of the case*" (Pet. 13; emphasis petitioner's). The district court explained that an accomplice witness " 'might be said to have an interest anyway in the case from the very fact that he is testifying' " (Pet. App. 18a).

the effect that a person who has an interest in a case is not *necessarily* testifying falsely, but that the jury must consider that possibility (see page 13, *supra*), is in itself considerably more critical of the credibility of such witnesses than the instruction petitioner unsuccessfully sought.

Because any defect in the disputed passages of the jury instruction was a failure to marshal relevant evidence, rather than a direction to disregard such evidence, as petitioner claims, there was no error in the court of appeals' reliance (Pet. 19a) upon the actual evidence presented and the defense summation to compensate for any omission. Nor does the decision of the court of appeals conflict with *United States* v. *Bernard*, 625 F.2d 854, 857-858 (9th Cir. 1980), on which petitioner relies (Pet. 13). Although the Ninth Circuit concluded that the failure to give special instructions on the testimony of an accomplice was reversible error in that particular case, the court's decision rested heavily upon the presence of other factors suggesting an especially high degree of unreliability, none of which were addressed by any cautionary instructions. The present case is readily distinguishable because the district court gave extensive instructions bearing upon the credibility of accomplice witnesses. And the Ninth Circuit's observation, 625 F.2d at 857, that the defense counsel's summation could not take the place of an appropriate instruction on accomplice testimony, has little application where, as here, the district court gave instructions on credibility of accomplice testimony that could be faulted, if at all, only for focusing on one of the kinds of circumstances that might suggest an interest on the part of a witness that would warrant special scrutiny of his testimony.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 82-596

IN THE

Supreme Court of the United States

OCTOBER TERM 1982

RUSSELL BUFALINO,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONER

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In the

SUPREME COURT OF THE UNITED STATES

October Term, 1982

NO. 82-596

RUSSELL BUFALINO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

REPLY BRIEF FOR PETITIONER, RUSSELL BUFALINO

Argument

I. Speedy Trial Act

The Government's brief in opposition characterizes the decision of the court of appeals as a narrow ruling hinging on the particular facts of this case. To the contrary, the ruling involves the fundamental issue of whether a trial court, under the provisions of the "Speedy Trial Act", is required to effect a prompt disposition of pretrial motions despite inaction by the parties.

The Government argues that the district court could not dispose of the Government's motion to sequester the jury since the court was anxious to hear the Defendants' position on the motion and neither Defendant had filed a response. The argument ignores the fact that the Government's motion was filed on March 27, 1981 and was pending for approximately six

months before the court made any attempt to obtain the Defendants' position on sequestration.

The issue involved here is if the court wanted input from the Defendants on the sequestration motion, did the "Speedy Trial Act" require that he promptly request that input rather than sit back and delay trial for six months while the motion was pending, unanswered.

The prompt disposition language of 18 U.S.C. Section 3161 (h) (1) (f) places a burden on the district court to see to it that pretrial motions are promptly made ripe for disposition. 18 U.S.C. Section 3161 (h) (1) (j) then assures that ripe motions will be determined without undue delay by limiting the excludable period for motions under advisement to thirty days.

If, as here, the district court does nothing for six months to bring a motion "under advisement", then the provision of the "Speedy Trial Act" requiring the court to promptly dispose of pretrial motions has been violated.

When the Act itself contemplates that trial will commence within seventy days after arraignment, there can be little justification for the district court to delay trial for seven months because of a simple unopposed sequestration motion.

The Government's brief makes certain references to the record which require clarification. The Government argues that when, after six months, the district court finally did ask the Defendants for their position on sequestration, counsel for the Defendants informed the court that they had yet to confer on the motion and would state their position later. (Gov't. 13). That statement is simply not true. When on September 30, 1981, the court asked for the Defendants' positions on sequestration, both defense counsel stated unequivocally they had no opposition to the motion. (Pet. App. 12a-13a). The only equivocation was on the part of Rizzitello's attorney and that was with respect

to the court's inquiry as to whether defense counsel would actually join in the Government's request for sequestration. (Pet. App. 13a).

Also, contrary to the statement by the Government, the Defendant's motion to dismiss under the "Speedy Trial Act" was not filed after the court had determined the sequestration motion (Gov't. 4), but rather was filed on September 30, 1981 prior to the disposition of the sequestration motion on October 19, 1981.

Finally, the Government argues that the delay in disposition of the sequestration motion was due to the Defendant's failure to respond to that motion. There is no requirement that a defendant respond to a Government motion he does not oppose. In any event, the Defendant's lack of response to a simple sequestration motion can hardly justify a seven month delay in the disposition of that motion. As stated previously, it was the court's obligation to promptly dispose of the motion despite any inaction by the Defendant. The court of appeals acknowledged that a defendant has no obligation to bring himself to trial and that the responsibility for pursuing a prosecution lies entirely with the Government. (Pet. App. 14a). It was therefore the Government's duty to prosecute its own motion and the record is clear that the Government did nothing with respect to its sequestration motion from the time the motion was filed on March 27, 1981 to the time it was disposed of on October 19, 1981. If the blame for delay is to be placed upon one of the parties, it must be placed upon the Government and not the Defendant.

II. Accomplice Instruction

The Government argues that despite the "somewhat equivocal" and "arguably inadequate" accomplice instruction given by the trial court, the defect was remedied by other "extensive instructions bearing upon the credibility of accomplices." (Gov't. 15).

The fact is, the court gave no instruction relative to the credibility of an accomplice other than that instruction quoted in the petition. (Pet. 13). The Government stated that the jury was alerted to the Fratianno plea bargain, to his grant of immunity, and to the monies he received under the Witness Protection Program. (Gov't. 12). However, there is absolutely no reference to these matters in the court's instructions. Although it is true that evidence was admitted at trial concerning these matters, the court's accomplice instruction in effect commanded the jury to disregard that evidence on the issue of credibility unless the jury found that those benefits were contingent on the outcome of the case, which of course they were not.

The Government argues that the court's general instruction about the possible falsification of testimony by an interested witness was more critical of the accomplice witnesses than the instruction proposed by the Defendant. (Gov't. 15).

However, the Government ignores the fact that the instructions of the district court defined "interest" as "interest in the outcome of the case" and since the only witness with an interest in the outcome was the Defendant, that instruction only served to question the credibility of the Defendant and not the accomplice witnesses. This instruction exacerbated the prejudice already created by the district court's erroneous accomplice instruction.

There is nothing in the record in this case which would distinguish it from the conflicting decision of the Ninth Circuit Court of Appeals in *United States* v. *Bernard*, 625 F. 2d 854 (9th Cir. 1980). In fact, since the error in *United States* v. *Bernard, supra,* merely involved the failure to give an accomplice instruction, while this case involves an accomplice instruction which actually prohibited the jury from considering crucial impeachment evidence, the prejudice created in this case far exceeds that in *United States* v. *Bernard, supra.* The conflict should therefore be resolved.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

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